Supreme Court, U.S.
FILED

No. 98 - 584

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *et al.*, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is section 306 of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act"), 49 U.S.C. § 11501, legislation to enforce the Equal Protection Clause of the Fourteenth Amendment so as to abrogate the States' Eleventh Amendment immunity from suit in federal court?

LIST OF PARTIES

Petitioner is the State Board of Equalization of the State of California. Respondents are: 1) the Southern Pacific Transportation Company, a Delaware corporation with its principal place of business in Omaha, Nebraska; 2) the Union Pacific Railroad Company, a Utah corporation with its principal place of business in Omaha, Nebraska; 3) the Napa Valley Wine Train, Inc., a California corporation with its principal place of business in Napa, California; 4) the Stockton Terminal & Eastern Railway Company, a California corporation with its principal place of business in Stockton, California; and 5) the Santa Maria Valley Railroad Company, a California corporation with its principal place of business in Santa Maria, California.

The following California Counties were defendants in the actions below: Alameda, Butte, Calaveras, Colusa, Contra Costa, El Dorado, Fresno, Glenn, Imperial, Inyo, Kern, Kings, Lassen, Los Angeles, Marin, Mendocino, Merced, Modoc, Monterey, Napa, Riverside, Sacramento, San Bernadino, San Francisco, San Joaquin, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, Shasta, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Tulare, Yolo, and Yuba

Title 28 U.S.C. § 2403(a) may apply and this petition shall therefore be served on the Solicitor General of the United States.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 98 -

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, *et al.*, *Respondents*.

OPINION OR JUDGMENT BELOW

The order of the United States Court of Appeals for the Ninth Circuit, filed July 6, 1998, is not reported and is reprinted in Appendix A. The order and judgments of the United States District Court for the Northern District of California are not reported and are reprinted in Appendix B. The decision of the Court of Appeals for the Ninth Circuit in *Oregon Short Line Railroad Company v. Department of Revenue, Oregon* is reported at 139 F.3d 1259 (9th Cir. 1998), and is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its order vacating and remanding the decision of the United States District Court for the Northern District of California that defendant State Board of Equalization was immune from suit in federal court pursuant to the Eleventh Amendment. The appellate

court remanded "for proceedings consistent with *Oregon Short Line R.R. Co. v. Department of Revenue, Oregon*, 139 F.3d 1259 (9th Cir. 1998)." This Court has jurisdiction to review pursuant to 28 U.S.C. § 1254(1). A decision denying Eleventh Amendment immunity is final for purposes of appeal. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

CONSTITUTIONS, STATUTES OR REGULATIONS

The Eleventh Amendment to the U.S. Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall a State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 11501 of Title 49 of the U.S. Code provides in relevant part:

> (b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority for a State or subdivision of a State may not do any of them:
>
> (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
>
> (3) Levy or collect an ad valorem tax on rail transportation at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
>
> (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.
>
> (c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true

assessed value and true market value is governed by State law. ...

Section 1341 of Title 28, United States Code provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Pertinent portions of the following sections of the California Constitution and the California Revenue and Taxation Code are reprinted in Appendix D:

Cal. Const., art. XIII, § 19;
Cal. Rev. & Tax. Code §§ 721, 722, 731, 732, 733, 741, 742, 743, 744, 755, 756, 2601, 2602, 2603, 5148, and 5170

STATEMENT OF THE CASE

Section 306 of the Railroad Revitalization and Regulatory Reform Act (the "4-R Act", 49 U.S.C. § 11501) prohibits States and their subdivisions from applying tax schemes that unreasonably burden and discriminate against interstate commerce. Since its enactment, railroads have routinely filed suits in federal courts throughout the country to challenge State tax assessments as violative of the 4-R Act. However, this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), called into question whether the 4-R Act's stated abrogation of the States' Eleventh Amendment immunity was constitutional. The Court of Appeals for the Ninth Circuit resolved the question in this case by granting the appellant railroads' motion for summary disposition. The Ninth Circuit based its ruling on its recent decision in *Oregon Short Line, supra,* which held that Congress enacted the 4-R Act pursuant to the enforcement provisions of the Fourteenth Amendment. The

Ninth Circuit therefore vacated the district court's judgment in this case dismissing the plaintiffs' suits for lack of subject matter jurisdiction.

The Ninth Circuit's ruling is inconsistent with this Court's precedent controlling the determination whether Congress passed an enactment to enforce the Equal Protection Clause of the Fourteenth Amendment. The California State Board of Equalization (the "Board") seeks this Court's review because of the importance of this issue to States' sovereignty, and because of the frequency with which 4-R Act cases are filed in federal court.

A. State-Assessed Property.

The Board is responsible for the annual valuation and assessment of the property of railroads and public utilities. Cal. Const., art. XIII, § 19; Cal. Revenue & Taxation Code §§ 721, 722, 731, and 732. Pursuant to California Revenue and Taxation Code section 732, the Board is required to mail notice to the railroads of the assessed value of their nonunitary property and advise them of the date by which a declaration of their intent to file a petition for reassessment can be filed. If a declaration of intent or a petition for reassessment is not timely filed, then the Board's assessment becomes final at the expiration of the period specified in the Board's notice. Rev. & Tax. Code § 733. If a petition for reassessment is filed, the Board's assessment becomes final on the earlier of its decision upon the petition or December 31 of the assessment year at issue. Rev. & Tax. Code §§ 741-744.

The Counties are responsible for the collection of state-assessed property taxes. On or before July 15 of any assessment year, the Board must transmit to each County auditor an estimate of the total value of state-assessed property. Rev. & Tax. Code § 755. By July 31, the Board must transmit the assessment roll to County auditors. Rev. & Tax. Code § 756. The County auditors prepare tax calculations and transmit the rolls to the County tax collectors and the County tax collectors collect the taxes.

Rev. & Tax. Code §§ 2601, 2602 and 2603.

Railroads have a State Court remedy for the refund of property taxes. Rev. & Tax. Code § 5148. Judicial review in these suits for refund is *de novo*. Rev. & Tax. Code § 5170.

B. **Proceedings Below.**

The Southern Pacific Transportation Company ("Southern Pacific"), its successor, the Union Pacific Railroad Company, and other railroads are the plaintiffs in 4-R Act cases that have been consolidated under one master case number in the U.S. District Court for the Northern District of California since 1981. The Napa Valley Wine Train, Inc., the Stockton Terminal & Eastern Railroad Company, and the Santa Maria Valley Railroad Company (the "Wine Train plaintiffs") are plaintiffs in another 4-R Act case that the district court designated as related to the master consolidated case. Plaintiffs in all these cases assert that the Board's classification, valuation, and assessment of certain railroad property violated the federal 4-R Act.

Following this Court's decision in *Seminole Tribe*, the Board filed a motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss all of the remaining cases in the master consolidated case as well as the Wine Train plaintiffs' related case. Southern Pacific and another plaintiff filed motions for summary judgment and to amend their complaints to include a separate cause of action against the defendant Counties, to add the individual Board Members as defendants pursuant to the doctrine of *Ex Parte Young*, and to allege that the 4-R Act was enacted pursuant to the Fourteenth Amendment as well as the Interstate Commerce Clause.

On October 28, 1997, the district court issued an order regarding all the parties' motions. With regard to the Board's motion to dismiss, the court ruled that, in enacting the 4-R Act, Congress expressly intended to abrogate the states' Eleventh Amendment immunity, but its use of the Interstate Commerce Clause to abrogate that immunity was

not a valid exercise of Congressional power. The Court therefore granted the Board's motion and denied the railroads' motions. Judgments were entered on February 3, 1998, and Southern Pacific and the Wine Train plaintiffs filed notices of appeal.

On March 23, 1998, the Ninth Circuit issued its opinion in *Oregon Short Line*, holding that the 4-R Act was appropriate legislation to enforce the Equal Protection Clause. Southern Pacific thereafter filed a motion for summary disposition pursuant to Ninth Circuit Rule 3-6. The Ninth Circuit granted the motion on July 6, 1998, vacating the district court's judgment and remanding for further proceedings consistent with the *Oregon Short Line* case. The district court entered judgment pursuant to the Ninth Circuit's mandate on September 16, 1998.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT'S RULING IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND THREATENS LIMITLESS CONGRESSIONAL ABROGATION OF ELEVENTH AMENDMENT IMMUNITY.

Relying on its recent ruling in *Oregon Short Line,* the Ninth Circuit vacated and remanded a district court judgment dismissing the 4-R Act cases for lack of subject matter jurisdiction on the basis of the Board's assertion of Eleventh Amendment immunity. In *Oregon Short Line*, and impliedly in this case, the Ninth Circuit has ruled that Congress properly abrogated the States' Eleventh Amendment immunity in the 4-R Act, because the Act is appropriate legislation to enforce the Equal Protection Clause of the Fourteenth Amendment. The Ninth Circuit's decision is inconsistent with this Court's precedent prescribing the test for congressional abrogation of Eleventh Amendment immunity under the Fourteenth Amendment. It expands Congress' ability to abrogate the States' immunity to statutes not based on a valid exercise of power.

As this Court ruled in *Seminole Tribe*, an attempted congressional abrogation of States' Eleventh Amendment immunity cannot be upheld under the Commerce Clause. 517 U.S. at 71-74. However, the Fourteenth Amendment can support a federal statutory abrogation of immunity, provided that Congress acts "pursuant to a valid exercise of power". 517 U.S. at 55. The 4-R Act was not enacted pursuant to a valid exercise of power under the Fourteenth Amendment.

The 4-R Act explicitly prohibits conduct by State and local authorities which "unreasonably burden[s] and discriminate[s] against interstate commerce...." 49 U.S.C. § 11501. As this Court and the Ninth Circuit, itself, have observed, the purpose of the 4-R Act was to "provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987); see *Trailer Train Co. v. State Board of Equalization*, 697 F.2d 860, 865 (9th Cir. 1983). The policy supporting the 4-R Act, memorialized at 49 U.S.C. § 10101, describes the commercial and economic objectives aimed at unburdening interstate commerce by strengthening the rail transport infrastructure of this country through competition and the free market. The only mention made of prohibiting discrimination is with respect to these economic goals, and with a specific reference to "interstate commerce".

In light of the prior holdings of this Court, the Board submits that Congress cannot validly invoke its enforcement powers under section five of the Fourteenth Amendment merely because the word "discrimination" appears within the statutory text. This Court has held that the enforcement power under section five is not unlimited. See *City of Boerne v. Flores*, 521 U.S. ----, ----, 117 S.Ct. 2157, 2163, 138 L.Ed.2d 624 (1997). Statutes enacted pursuant to Congress' section five enforcement power must be remedial in nature and designed to prevent a constitutional infraction. *Id.*

Before the 4-R Act was enacted, this Court held that conventional discrimination between railroads and other classifications of property were not violations of the railroads' right to equal protection. See, e.g., *Nashville Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362,

367-371 (1940).[1] Without evidence that Congress, in enacting the 4-R Act, was acting properly to remedy Fourteenth Amendment violations, the 4-R Act cannot constitute proper action under that amendment. *City of Boerne*, 521 U.S. at ---, 117 S.Ct. at 2168-2169.

The 4-R Act does not contain a congressional expression that the Act was passed "to secure the rights under the Fourteenth Amendment." Cf. *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966). Prior to the passage of the 4-R Act, disparate classifications concerning railroads for taxation purposes did not violate the Equal Protection Clause. See *Browning*, 310 U.S. at 369 ("so far as the Federal Constitution is concerned, a state can put railroad property into one pigeonhole and other property into another ...").

Nevertheless, the Ninth Circuit characterizes such classifications as unconstitutional and sufficient to warrant congressional enactment of the 4-R Act under the Fourteenth Amendment Equal Protection Clause. *Oregon Short Line*, 139 F.3d at 1267. However, as this Court stated in the *City of Boerne* case, "Congress does not enforce a constitutional right by changing what the right is." 521 U.S. at ---, 117 S.Ct. at 2164. Congress cannot make constitutional classifications unconstitutional, even if it can make such classifications unlawful. The 4-R Act prohibited long-standing, constitutionally permissible discriminatory taxation practices. While it has such powers under the Commerce Clause, it could not make such discrimination unconstitutional under the Equal

---

1. "That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate--these are among the commonplaces of taxation and of constitutional law." *Browning*, 310 U.S. at 368.

Protection Clause. Moreover, it should not be inferred, solely for the purpose of circumventing the States' Eleventh Amendment immunity, that the Act is legislation to enforce the Equal Protection Clause. See *Quern v. Jordan*, 440 U.S. 332, 342-345 (1979). This Court has noted that, when Congress has not expressly articulated its intent to legislate pursuant to the Fourteenth Amendment, this Court will not "quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Pennhurst State School v. Halderman*, 451 U.S. 1, 15-16 (1981).

The Ninth Circuit's permissive test for implicit abrogation of Eleventh Amendment immunity creates a grave danger of limitless congressional and judicial overrides of the States' immunity from suit in federal court. Under the Ninth Circuit's reasoning, *Oregon Short Line*, 139 F.3d at 1266, a federal court is free to find that Congress abrogated Eleventh Amendment immunity under the Fourteenth Amendment by a statute that prohibits conduct which is not itself unconstitutional, so long as the court determines that the effect of the statute can be expected, under at least some circumstances, to result in enforcement of a Fourteenth Amendment guarantee. Significantly, the Ninth Circuit found it unnecessary in *Oregon Short Line* to determine whether the railroad had been deprived of any Fourteenth Amendment guarantees.

Without a constitutional infraction of the Fourteenth Amendment, there is no issue to address concerning whether the section five enforcement power can be employed to abrogate the States' Eleventh Amendment immunity. Thus, in the 4-R Act, Congress could not have been acting to redress a Fourteenth Amendment injury, for no Fourteenth Amendment injury existed. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at —, 117 S.Ct. at 2164. Accordingly, after the *Seminole*

Tribe decision, and in the absence of any other legitimate constitutional grant of power, the congressional intent to abrogate the States' immunity under the 4-R Act cannot be upheld as enacted pursuant to a valid exercise of Fourteenth Amendment power. The Ninth Circuit's test for validity under section five of the Fourteenth Amendment is so permissive, "it is difficult to conceive of a principle that would limit congressional power." *City of Boerne*, 521 U.S. at —, 117 S.Ct. at 2168. This Court should grant the petition to curtail the Ninth Circuit's permissive test for congressional abrogation under the Fourteenth Amendment.

CONCLUSION

In *Seminole Tribe* this Court ruled that the Fourteenth Amendment is the sole source of Congressional power to abrogate unilaterally the States' immunity from suit in federal courts. *Seminole Tribe* teaches that the Commerce Clause does not grant Congress the power to abrogate Eleventh Amendment immunity, and makes clear that Congress' power to abrogate is limited.

However, the Ninth Circuit's decision radically expands congressional abrogation authority. Under the Ninth Circuit's reasoning, a federal statute, such as the 4-R Act, intended to ameliorate Commerce Clause concerns, can be linked to the Fourteenth Amendment simply by a congressional reference to the word "discrimination", even if the discrimination does not violate Equal Protection guarantees. The Ninth Circuit's reasoning emasculates the essential teaching of *Seminole Tribe*. The petition should be granted to ensure the vitality of that important decision and to curtail further encroachment into States' Eleventh Amendment immunity.

Dated: October 5, 1998.

Respectfully submitted,

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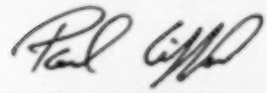

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